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Supreme Court of the United States.

No. 275.

THE DISTRICT OF COLUMBIA

vs.

ARMS, Adm'r of DuBose.

In error to the Supreme Court of the District of Columbia.

PLAINTIFF'S BRIEF.

A. G. Riddle, *for D. C.*

Judd & Detweiler, Printers.

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PLAINTIFF'S BRIEF.

THE CASE.

The plaintiff below describes himself as a physician and surgeon; served as a contract surgeon in the army before and after the accident counted upon; alleges that on the evening of the 21st of February, 1877, at the city of Washington, while proceeding along the sidewalk on the east side of Thirteenth street northwest, toward F, he fell off from the small parapet, running west from the wall of the buildings 18 or 20 feet, was bruised and injured his spine; in consequence of which he became diseased, finally partially paralyzed, wholly broken in body, and impaired in mind, as he claimed on the trial.

The District took issue, and later the plaintiff, on leave, amended his declaration, to which a demurrer was interposed and overruled.

See Rec., pp. 5 and 6.

The trial was had February 26, 1880, three years after the accident.

THE LOCUS.

Thirteenth street was improved, and afterward the grade of F street reduced some three feet at the intersection, and Thirteenth correspondingly reduced, carriage-way and sidewalk, leaving the original grade next the buildings as it was. The sides thus left along the sidewalk were unprotected, and at each end two steps were placed for such as used that part of the common open space.

Rec., pp. 21–25.

HISTORY OF THE ACCIDENT AND CASE.

DuBose, the intestate, proceeding along the sidewalk, between G and F, met three ladies, and turned to the left. This was at a point where the sidewalk proper was on the same grade with the open space between it and the buildings. He passed the invisible line, and continuing south, not seeing the steps, fell, and received *some* injury, for which, if the District is liable for constructing that part of the street as it did, he should have compensation, if he was right in turning to the left, which was the immediate cause of the accident. It is not now insisted that he was in fault for turning to the left.

A policeman saw the fall, and helped him up, when he proceeded alone to his boarding-house, took a cold bath, cared for himself; was bruised, sore, lame, and *complained of his spine*, (p. 10.)

He kept about, and on the following 4th of March went to Boston and Chelsea, and put himself under the care of Dr. Cutler, and remained, as he says, till the 12th of June,

(pp. 10, 11,) when he went to South Carolina, and, as he says, he staid there a month and a half, and then returned to Chelsea. In this he is mistaken. He was not in Chelsea again until May, 1879. (Dr. Cutler's dep., p. 23.)

We have no reliable account of him after he left Chelsea, nor any account. He was entirely unable to give information of himself, and no witnesses, as to his personal history from that time till he was placed in the Freedmen's Hospital, under Dr. Purvis, the last of June, 1879, were called, (p. 26.)

So there is a complete hiatus in his history from June, 1877, to June, 1879. All the evidence given is embodied in a case, and several questions arise on the exceptions taken by the plaintiff in error, and a question of the amount of damages. Conceding liability for the fall of DuBose, it is contended that the evidence shows that the worst consequences of the case were due to a want of care on the part of the intestate in the first place, and there is an utter want of proof showing a history of the case after June 12, 1877, which it was the duty of the claimant to produce, and its absence weighs strongly against him.

ASSIGNMENT OF ERRORS.

The Court erred in sustaining the court below.

a. In permitting the plaintiff below to give evidence of other and similar accidents by reason of the locus.

b. In the refusal to take the testimony of the plaintiff below from the jury as requested.

c. In refusing to instruct the jury that his testimony was wholly without value.

d. In refusing a new trial by reason of the excessive damages awarded by the jury.

I.

The court permitted the plaintiff below to prove three several distinct accidents at the locus of the same character of that set out in the declaration, (pp. 16, 24, 25,) to which ruling the District excepted, (p. 16.)

Thus, without notice or preparation, the District was obliged to try these several cases.

The jury were perplexed, misled by them, and may have awarded damages for them all.

These collateral issues are condemned by all the text-books.

1 Greenleaf, sec. 52, 448.
2 Starkie, 381.
2 Best. Sec., 644.

And directly by many cases.

Collins *vs.* Dorchester, 6 Cush., 396.
Aldrich *vs.* Pelham, 1 Grey, 510.
Hubbard *vs.* Concord, 33 N. H., 52.

II.

The District asked the court below to take the testimony of DuBose, the plaintiff below and principal witness, from the jury after the evidence was closed, on the ground that at the time of the trial he was an incompetent witness by reason of unsound mind. This was the first time the question could be made, as the evidence of his insanity was not complete till that time, (p. 30.)

The question of the competency of a witness is purely one of law for the Court whenever raised.

Stevens' Dig. Ev., p. 110.

Livingston *vs.* Hermania, 10 Johns., 362.

1 Greenleaf Ev., sec. 365, and note 2. *Id.*, 160, *n.* 3.

Com. *vs.* Hill, 10 Cush., 532.

1 Best Ev., sec. 133.

And numerous authorities.

"It is the province of the judge who presides at the trial to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility. And his decision is conclusive, unless he saves the question for revision by the full court on a report of the evidence, *or counsel bring up the question on a bill of exceptions which contains a statement of the evidence.*"

1 Greenleaf on Ev., (13th ed.,) § 49, *n.* 3.

See also—

9 Cush., 511, Gorton *vs.* Hadsell.

7 Metc., 537, Foster *vs.* Mackey.

12 Metc., 159, Dole *vs.* Thurlow.

10 Ad. and El., N. S., 323, Doe *vs.* Jenkins.

7 Welsby, Hurls., and Gordon, 428, Cleave *vs.* Jones.

THE MENTAL CONDITION OF THE WITNESS AT THE TRIAL.

Dr. Godding, Superintendent Government Hospital for Insane, produced for the plaintiff below:

> I know Dr. DuBose; have seen him this morning; I first saw him in the early part of July, 1879; I saw him at the Government hospital, St. Elizabeth; he was brought there by order of the Commissioners of the District, and *was at that time affected with acute melancholy, having wounded his throat with a fork; he was admitted to the hospital 3d July*, 1879, and I ex-

amined him that night or the next day; am not positive; I think he was received by my assistant; *the condition of the case was one of deep depression, and it was hardly possible to get a word from the doctor;* he moved with difficulty; I observed a loss of motion; that condition of depression remained for some two or three months; may be more; and the doctor would answer me in monosyllables, or answer me in two or three words in talking; but gradually, I cannot say exactly as to dates, but gradually he began to talk more; I thought when I first saw him that he had lost complete control of the muscles of the organ of speech; he walks with difficulty; takes steps with difficulty; he walks on an elevation with a certain amount of hesitation; always a difficulty in ascending stairs; *from depression he became quite pleasant, smiling and talking, and with it a disposition to take the papers and read some, or attempt to read; I think the case has nearly been stationary in that respect for the last two or three months; an easier articulation, or if not an easier articulation, a greater grasp of the mind, which enabled him to use the words and converse; but a mind easily confounded, easily made to give contradictory statements; memory impaired to a considerable extent, certainly in regard to recent events.* My impression from the history of the case—it is not a matter of personal knowledge—is, that the man suffers from a paralysis of the lower extremities; a partial paralysis was apparent and a general impairment of the muscular powers, and an impairment of the strength of the back and the spine, and more marked in the lower extremities; *the conclusion, then, that I came to in regard to the mental trouble was that it probably originated, directly caused, from the partial paralysis which was apparent when he first came under my personal observation; there was paralysis and impaired intellect both existing from facts anterior to that;* there was no especial injury that I observed, personally to the limbs or knees that may be attributed the peculiarity of his gait; as to the prospect of recovery of Dr. DuBose from his present condition I can give you my opinion in the matter, that *I do not expect beyond slight improvement any change for the better; I do not think it would be safe to relieve him from the custody of the officers of St. Elizabeth Asylum to go out alone; I*

do not know that there is any active insanity that would make him dangerous to others, but he should be in the care of some person wherever he is, (pp. 18, 19.)

* * * * * *

On cross-examination:

With reference to his mental condition he was laboring with acute melancholy when he reached me. The present condition of his knees is normal; there is no displacement; there is a weakening of the muscular organ, and weakness of the nerve power; the difficulty is especially with the spine; there is no injury to the knee that has produced anything permanent; *I do not to-day regard him as a man of sound mind; his memory is impaired; the memory of recent events probably more so than those occurring years ago; I think his testimony in an important matter should be taken with the allowance made that the man is not of full vigor and strength of mind; my own belief is that he is able to make a substantially correct statement of facts transpiring before the mental injury took place, but that the memory is so far impaired that he might leave out some important point—there would be a confusion of ideas; I do not think that he should be held responsible for any criminal act committed by himself; the statements upon which I give my opinion I got from the doctor*, (p. 20.)

Dr. C. B. Purvis, Superintendent of the Freedmen's Hospital:

He became very worried about being in that hospital, speaking about his love affairs, and at last he entreated me to bring him books to read and to give him the privilege of going wherever he wanted to go, and he wanted to be moved from that building to a brick building, that being more of a private building; two or three days after that he attempted to commit suicide; *I tried to get him to go down with me to see his attorneys; I did call on them, but they were out; I thought his mind was becoming affected; I thought he had better be moved; I think I tried to coax him, but he had an idea that his creditors were after him, and he complained constantly of his poverty; he became insane and attempted to commit suicide; I saw him about an hour before. The next day I saw him, and we sent him away;*

at that time, as a medical man, I would say he was insane and attempted to commit suicide; he took a fork and stuck it into his neck several times; his food was brought to him and his fork was on the plate; it was not very serious; a man seized his hand at the time, but he did a little damage; he seemed to know where to stick though, he had judgment enough to know where a vital part could be reached; I have not seen him since; *at that time he was insane; this was towards the end of June*, 1879; *he went from there ultimately to the insane asylum across ths river*, (p. 27.)

* * * * * * *

I think it is the exception for a man who received an injury to the spine to become crazy; in a majority of cases I do not think that any serious consequences would have resulted from the injury if he had kept himself perfectly quiet for three, four, five or six weeks; I think absolute quiet would have improved his condition, and might have prevented any other serious results; it would have been a preventive treatment certainly; the effect of exposure to the cold, while on the frontier acting as an army surgeon, would have aggravated the case; it should have been avoided; if he had exposed himself and caught cold it would have been a great deal worse, (p. 28.)

Declared by the expert to be irresponsible for crimes unsafe to be at large, an attempted suicide from insanity; how does he fare as a competent witness tested by examination in presence of the court?

Take this, more than a page continuously, from his evidence in chief in the hands of his counsel, (p. 11.)

Q. Prior to your injuries, *what had been your profession*?
Witness. Mine?
Counsel. Yes, what had been your profession in life?
A. Well, *I was engaged as an examiner for an insurance company.*
Q. Are you a physician?
A. Yes, sir.
Q. *Where had you practiced your profession*, and in what general capacities before your injuries—before you were hurt?

A. *Well, I hardly had any profession. I was at many things.*

Q. *What was your profession, and in what business had you been employed—what was your occupation before you were hurt?*

A. *I was in various traffics.*

Q. *You have been a physician, have you not?*

A. *Yes, sir.*

Q. *Had you been in the army before that time?*

A. *I went to an old place called Fort Romsa; I stayed there quite a little while, and I went to Fort Smoot, and I stayed there five years.*

Q. What was your occupation during that time—what were you doing?

A. I was in charge of the Post, a small post. I was in charge of the post five years.

Q. As doctor?

A. As post surgeon.

Q. *Had you served at New Orleans at all?*

A. *I was there, and turned over my property when they broke up the department.*

Q. They broke up the department, and you went to New Orleans and turned over your property?

A. Yes, sir. That department broke up, and I stayed there six or eight weeks, *and I went into the Medical Director's Office about ten o'clock one morning, and he put on his jacket, his seal jacket, and got up and said that he would see me again.*

Q. *Never mind about that. Then you had served as post surgeon in the army at Fort Smoot?*

A. *Yes, sir; and at Cheyenne until the proper surgeon took charge, and Colonel White of the 11th told me that I could make the trip.*

Q. (Interrupting.) *You were in the United States army?*

A. *Yes, sir. I stayed at Cheyenne, and was in New Orleans six weeks.* I stayed there pending my claim for commutations.

This from the first of the cross-examination, p. 14:

By A. G. Riddle:

Q. Where were you educated as physician?

A. I went to school in Savannah.

Q. Did you graduate there?

A. Yes.

Q. *When did you graduate there?*

A. *I was going.*
Q. *But you remember when it was, don't you?*
A. *No.*
Q. *Where did you go to practice your profession from there?*
A. *In the country.*
Q. *When did you first become surgeon in the army?*
A. *Yes.*
Q. You say you were a surgeon in the army before this accident; I want to know when?
A. About 1872; the dates are in the Surgeon-General's Office.
Q. How long had you been in the service before this accident; how many years?
A. About six years.
Q. *How long had you been out of the service before you met with this fall?*
Witness. In the service?

One extract further from p. 15:

Q. How long did you stay in Washington after the accident?
A. I stayed there until the inauguration of President Hayes.
Q. Then you went away; *what time was it that you arrived in Chelsea, Boston and Chelsea?*
A. *I went there in a coach that left here just as soon as the President was inaugurated.*
Q. *Did you go to the inauguration?*
A. No, I could not go; I went down to the depot, and I got in a coach and went clear through to Boston, and then went to Chelsea.
Q. How soon after you got there was it before you called this doctor?
A. Immediately.
Q. How long did he attend to you?
A. He attended to me while I was there.
Q. How long was it? don't you know?
Witness: When was the inauguration of President Hayes?
Q. You went away from here when the President was inaugurated, and went to Chelsea and employed this doctor; how long did he have the care of you?
A. Until some time in June.
Q. Then you left there and went west?
A. No.

Q. Where did you go?
A. I went to South Carolina to see my brother.
Q. You were well enough to travel then?
A. It was too hot down there, and I went from there to Chelsea.
Q. Did you go back from South Carolina to Chelsea again?
A. Yes.
Q. When you got back to Chelsea that time, what time of the season was it; was it fall or winter?
A. It was summer.
Q. How long did you stay there that time?
A. I stayed there until I got a new contract in December.
Q. Then you left Chelsea and went to perform the new contract?
Mr. Birney: I don't think he said he went back to Chelsea a second time.
Mr. Riddle: Yes, he did; did you go from South Carolina back to Chelsea?
A. Yes; I went back there because I could not live in the hot climate.

He was under the delusion that he went from South Carolina back to Chelsea, when in fact he was not there again till May, 1879, (Dr. Cutler's dep., p. 23;) and though Dr. Godding thinks his memory good for facts before his injury, he could only say he graduated young.

In addition to the cases cited, see the following:

1 Greenleaf on Evidence, Sec. 365.

Error for the court to admit the testimony of a witness when he is shown to be insane, or evidence is offered to prove that fact and rejected.

Livingston *vs.* Kiersted, 10 Johns., 362.

Where a person, under an insane delusion, is offered as a witness, it is for the judge, at the time, to decide upon his competency as a witness, and for the jury to judge of the credibility of his evidence.

Reg. *vs.* Hill, 15 Jur., 470; 5 Eng. Law and Eq., 547; 5 Cox Cr. Cas., 259; I Greenl'f Ev., § 365, *note* 2.

Whether upon the whole evidence the witness is an atheist is a question solely for the presiding judges.

Commonwealth *vs.* Hills, 10 Cush., 532.

A witness is incompetent if in the opinion of the judge he is *non compos.*

Stephen's Dig. Law of Ev., 110.

It is the exclusive province of the judge to decide as to competency.

1 Gr. Ev., § 160, note 3, and Sec. 49, notes 1 and 3; *Coleman* vs. *Com. Sup. Ct., Va.*, 2 *Am. Law Times, N. S.*, 390.

1st Best on Evidence, Sec. 133.

Armory *vs.* Fellows, 5 Mass., 229.

Cook *vs.* Mix, 11 Conn., 432.

Norton *vs.* Webster, 12 Ad. and E., (40 E. C. L. R.,) 442.

Reynolds *vs.* Loundsbury, 6 Hill, 534.

It is error to instruct the jury, after admitting the testimony of a witness, to disregard such testimony if they shall find that the witness is interested.

Chouteau *vs.* Searcy, 8 Miss., 733.

If the evidence leave it in doubt what the injury was caused by, the verdict must be for the defendant.

20 Maine, 47, Libbey *vs.* Greenbush.

III.

It seems entirely clear to me, that if due weight is given to the evidence, that the verdict must be reduced by, at the least, two-thirds, or a new trial granted.

It will be remembered that the alleged defect in the street

causing the injury was, in fact, a defect in the plan of the street itself, which, doubtless, if insisted upon, was a legal ground of defence to the action.

After very mature consideration I decided not to rest on that. It seemed to me, on the whole, just and proper, that the injured party should be compensated for the actual wrong received at the hands of the District, as it was clear to me that the graver consequences were due quite entirely to his want of care of himself, a flagrant negligence on his part, when his profession is considered.

We are compelled to resort to him as a source of information, and resting, as the claimant's case does, upon his competency as a witness, his representative is estopped from denying my right to this evidence.

My point is, that the testimony establishes a want of proper care of himself after the injury, and that the grave consequences of it are mainly due to this source. It was, at the best, largely contributory. The case could not have resulted worse with no care.

This, on recurrence to the evidence, is made very clear.

Describing the accident, Dr. DuBose said, p. 10:

Witness: I know, after I got a little over this, he (the policeman) set me up on one of those steps, and I stayed there a little while, and after a while he wanted me to go to a drug store, *but I told him I was a surgeon, and I went to my quarters-room, and took a bath and some chloral; I was in utter misery.* My knees were wet, and I had heavy English trowsers on, and they were cut, and my knee was bleeding, my hands were blistered, and *my back was evidently concussed, and spine was more or less injured.*

Here this surgeon declares that *his spine was more or less injured.*

Dr. Godding thus declares the proper course of treatment for this injury to the spine:

I have had the ordinary education of a physician and surgeon. *If the patient had been brought to me with the description given, I would, as a physician, have addressed my attention to find out whether any bones were broken, and if there was any injury to the spine. I think that good surgery would have required some attention to the spine. I think a prudent surgeon would have advised rest in bed for two or three months, or to remain quiet.*

Looking at the case in the light that I know now, I should think that it would have been the best thing for the patient to have had some period of quiet rest. *I am not sure that the injury done was immediate, but should say that anything like active exercise should have been enjoined for some weeks. I would say, in behalf of the profession, that a person injured as the doctor was on the 21st of February, and remaining here until the 4th of March without calling in a physician to care for him, might feel, being a physician, and not being injured in his head, that he was a good judge of his own case.* I do not necessarily regard a physician as an expert in his own case. I think he is to a certain extent an expert in his own case; he might be injured in a way that he could not attend to himself. *In my judgment* the practice of his profession as an army surgeon would be one that would likely to aggravate the difficulty; I mean personal exposure, (p. 19.)

This is Dr. Purvis' opinion on the same point, from 27:

Q. Now, doctor, let me give you this case: I will assume that, between the time of the injury, which was the 21st of February, the patient took charge of himself, being a surgeon; he remained about down here; we do not get a very intelligent idea of what he is doing, and was confined to his boarding-house, and remained here until the 4th or 5th of March, when he made a trip to Boston; *we may assume that he had some injury to the spine, but that that had not developed itself, what would you have deemed it necessary under the circumstances?*

A. *I would have deemed it necessary to have kept that man in a quiet condition for six months or a year; plaintiff, knowing the nature of his injuries, he should not, I think, have done anything, engaged in any employment; I could not tell from what I know of the history of this case that this spinal injury could be*

traced directly to this fall; I would have to know more about the history of the man, his habits of life, and tendency to insanity in the family, &c.; I think it is the exception for a man who received an injury to the spine to become crazy; in a majority of cases I do not think that any serious consequences would have resulted from the injury if he had kept himself perfectly quiet for three, four, five, or six weeks; I think absolute quiet would have improved his condition, and might have prevented any other serious results; it would have been a preventive treatment certainly; the effect of exposure to the cold, while on the frontier acting as an army snrgeon, would have aggravated the case; it should have been avoided; if he had exposed himself and caught cold it would have been a great deal worse."

Here is an injury to the spine, and a clear declaration of the proper treatment.

We are obliged to resort again to Dr. DuB. for a history of the case. This from p. 10:

A. I went right down on my knees and hands, and I went to my room, stayed there, and fixed myself in such a manner that I could take care of myself. I took a *straight bath* [cold water] *and went away on the day the President was inaugurated, and went to Boston, and from there to Chelsea.*

Q. You left here on the fourth of March?

A. Yes; I got in a carriage, a kind of conveyance, and rode down to the depot, and rode to Boston by crossing the river in a coach; and I did not get of it out until I got to Boston.

Q. You have stated here how the left knee was cut, and the trowsers cut across; how about the right knee?

A. It was contused.

Q. You went to Boston when you left here on the fourth of March?

A. Yes, and went to Chelsea, where I lived.

Q. What physician did you see in Chelsea?

A. Dr. Cutler.

Q. *From Chelsea where did you go?*

A. *I stayed there until the 12th of June.*

Q. *What was your condition while you were in Chelsea?*

A. *Very bad.*

Q. *Were you able to stir about?*

A. *No, I do not think I went about.* I stayed with Mrs. Gloucester—they were friends to me—*until June, and then*

went to Columbia, South Carolina, where a brother of mine had a plantation.

Q. In South Carolina?

A. Yes; Thomas C. DuBose. *I stayed there about a month and a half, but the climate almost killed me; my secretions and everything else were interrupted. I went to a colder climate. I took the Harrisburg road from Washington, and I went up to Harrisburg, and from there to Cincinnati, and there I got a good bath, and got into one of those elegant coaches on the Chicago and Saint Paul Railroad, as good a coach as there ever was, and I went to Saint Paul, and there stopped over until General Sloan, the medical director, ordered me—and I asked him, and he sent me—to Alden Green.*

From p. 12:

Q. You have told us what your condition was after you received your hurt, here in Washington and afterwards at Chelsea, what was your condition—*what was the condition of your knees and your back when you were out in St. Paul; was it better or worse?*

A. *I could not climb up stairs to go to my room.*

Q. How does it affect you now with regard to your ability to stand for any length of time?

A. I cannot stand five or ten minutes.

Q. Where do you suffer.

A. In my whole back and legs.

Q. How does it affect your ability to go up and down stairs?

A. I cannot do it.

Q. How is about your being able to walk; can you walk any distance?

A. No; I cannot.

Q. How are your legs affected?

A. They are affected in my knees.

Q. How does it affect them; are they stiffened?

A. I cannot cross them this way. [Indicating.]

Q. You cannot cross them except by the use of your hands?

A. Not to save my life.

Q. Do you feel any pain in your back?

A. I can hardly turn myself in bed.

Q. *Did Dr. Cutler examine you in Chelsea. You saw him; did you?*

Q. *Yes, sir.*

Q. *When you went from here to Chelsea?*

A. Yes, sir; I think he gave a certificate on commission; I mean testimony on commission.

Mr. Birney. Yes; his deposition is in this case.

Page 13:

Mr. Birney: Did you consult any physician here after you were hurt?

A. Nobody.

Q. After you were hurt, and before you left Washington, were you treated by any doctor or did you treat yourself?

A. I simply treated myself with camphor liniment.

Q. You did not call on any other doctor?

A. No, sir.

Q. Then when you reached Chelsea you consulted Dr. Cutler?

A. That was a long time after that.

Q. After you were hurt, and before you left Washington, which was about ten days, about fifteen days, did you call any other doctor to examine you at the boarding house where you were?

A. No.

Q. You are a regular educated physician, and have served, as you testified, for five or six years as surgeon?

A. Yes, sir.

Substantially from the time he left Chelsea till he returned two years later all is a blank, though it was the duty of plaintiff below to have enlightened the whole important period with evidence. The only glimpse we get is from the testimony of Dr. Cutler, (p. 23,) and that is from DuBose.

Q. *Did said DuBose leave Chelsea after the month of February*, 1877; *if so, state if you know where he went, in what business or capacity;* and if he returned to said Chelsea, state when he returned, and if you know what his mental and physical condition was after such return, state what it was; and if any infirmity or disorder existed, state the character, nature, and locality thereof, and your opinion as to its origin?

A. *I think he left in the month of April*, 1877, *and for a time stopped in St. Paul; not long after this I had a letter from him dated at Dakota, being then in the army; at this time he stated that his spinal irritation was so troublesome that he feared he should be forced to leave the army, and was finally compelled to in*

September, 1878. *After leaving the army he attempted to do office practice at St. Paul, (not being able to attend out patients,) but finally was forced to give that up and returned to Chelsea in May*, 1879, *in a condition very much worse than I last saw him; had less ability to use his limbs, having a tendency to paraplegia, complained of pains and heat in back and head, with tenderness in cervical and lumbar vertebræ; his intellectual faculties showed evident signs of failing; he became fretful and angry at trifles; he seemed to have lost all idea of time, and was forgetful; all of which symptoms I believe to have resulted from organic changes in the spinal nerve, from which he will never recover.*

Q. *State when you last saw said DuBose, and whether or not his condition was at that time the same as you have described in answer to interrogatory No.* 7, *or similar thereto, and state what you* know as to his whereabouts since that *time?*

A. *I think it was in May*, 1879*; his condition was much worse than when I saw him at time he came to Chelsea before; since this I have heard from him once, and then he was under treatment in a hospital in Washington, D. C., and had been there much of the time since leaving Chelsea.*

The plaintiff below, by his own evidence and that of his principal witness, shows a flagrant disregard of the clearest medical rule of his case.

Rest, repose, persistent, long continued, under medical care, was essential.

So far as we learn, save a little time at Chelsea, he had neither. A restless, irritating habit of body, long, painful journeys, and foolish effort to labor.

He took charge of his own case, restless, ever on the move. We have no proof of seeming recovery that might have deceived him for a single day. He grew gradually worse, until he died; while, so far as can be determined, he might, with proper care, have entirely recovered.

It is submitted, with entire confidence, that, whatever may have been the extent of the original injury, to the want of common care, common prudence, on the part of the plain-

tiff below, is to be charged the unfortunate result of his case—the end of his unhappy life.

This, as I know, was the view of the case taken by the justice who tried it at *nisi prius*—a view he failed to give effect to at the latest moment.

When it reached the Generel Term, that learned body, like the unlearned jury below, found in the shattered condition of the plaintiff, which rendered him incompetent as a witness, strength and power as a suitor, which rendered his case invincible.

Very respectfully,

A. G. RIDDLE, *for D. C.*